IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEALNO.1153 OF 2005

Shri Saiprasad Sitaram Koli .. ..Appellant
Versus
Smt.Gangabai @ Janabai Sit aram Koli
and Anr. .. ..Respondents

Mr.N.V.Bandiwadekar for appellant

Mr.Narendra Walawalkar with Mr.G.H.Keluskar for respndents

CORAM : P.V.KAKADE, J.

DATE : 11TH OCTOBER, 2005.

P.C.:

1. The appellant has preferred this appeal against the judgment and order passed by Addl. District Judge, Raigad Alibag dated 30.3.2005 dismissing the appeal and confirming the decree passed by the Civil Judge, Junior Division dated 29.9.2001.

2. I have heard the learned counsel for both the parties. Perused the record.

3. The plaintiffs filed the suit for declaration and recovery of possession and consequential relief of permanent injunction against the appellant-defendant on

the ground that the suit property was given to the plaintiffs by deceased Nirabai Koli by registered Gift Deed dated 9.1.1961 and she was in possession of the suit property by virtue of the said gift deed. It was further held that the defendant made illegal encroachment on 1.10.1994 in suit property and hence the suit came to be filed. The defendant contested the suit, inter alia, denying the allegations made by the plaintiffs and sought dismissal of the suit.

. The learned trial judge adjudicated the dispute on merits and came to the conclusion that the plaintiffs had proved the registered gift deed and the title derived by the plaintiffs by virtue of the said gift deed. It was also held that the plaintiffs were in possession of the suit property on the basis of the said gift deed and defendant made illegal encroachment on 1.10.1994 in the suit property and as such suit came to be decreed. The appeal was carried to the District Court. The learned addl. District Judge after hearing both the parties concurred with the findings recorded by the lower court and dismissed the appeal. Hence the present appeal.

4. At the outset, it must be noted that there is absolutely no substantial question of law involved in this appeal. Both the courts below have properly appreciated the entire evidence on record in proper perspective and it would brook no interference. The learned counsel for the appellant made submission to the effect that the plaintiff no.1 did not enter into the witness box and her son entered into the witness box on the basis of power of attorney and therefore, it was urged that the evidence of power of attorney holder could not be sufficient to prove the Gift Deed. In support of this contention the learned counsel for the appellant put reliance on the Apex Court ruling in the case of **Janki Vashdeo Bhojwani and anr. vs. Indusind Bank Ltd. and Ors. reported in AIR 2005 SCC 439** wherein it was held that the power of attorney holder cannot depose as principal as in the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined. Therefore, on the basis of this ruling it was submitted that the evidence of the power of attorney holder is of no use to prove the plaintiffs' claim and therefore, the appeal deserves to be admitted.

. However, in this regard it must be noted that this point is being raised for the first time at the time of admission of the Second Appeal, admittedly, this point was not raised either at the trial stage or in the lower appellate court nor there was single question in this regard to the power of attorney holder who was exhaustively cross-examined during the trial. It is to be noted that the parties are closely related and in fact are residing in the said house. In this regard, I am inclined to hold that even if it amounts to question of law, though not substantial question of law, it cannot be raised for the first time in Second Appeal, when there is no foundation laid down either in the lower appellate court or during the trial. In the case of **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar & Ors. reported in AIR 1999 SC 2213** the Apex Court has categorically held that where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as substantial question of law in second appeal. In my considered view, this is the ratio of Kondiaba's case (supra) which actually fits to the present case and therefore, I hold that this question cannot be allowed

to be raised for the first time in the second appeal in the absence of any factual format and foundation laid down by the appellant during the trial or in the lower appellate court. Therefore, taking into account the concurrent findings recorded by both the courts below I hold that there is no merits in the appeal and appeal stands dismissed with no order as to costs.

. Consequently Civil Application No.1635 of 2005 also stands dismissed with no order as to costs.